

REMARKS

Applicants appreciate the courtesies extended by Examiners M. Cano and R. Madsen during an interview on July 24, 2003 with Applicants' attorney, Jeffrey A. Wolfson. The comments appearing herein are substantially in accord with those presented and discussed during the interview.

Claims 26-36 and 38-46, as amended, are pending for the Examiner's review and consideration. Claims 26 and 38 have been amended to recite that the cream compositions have a water activity (A_w) of 0.75 to 0.91 and 0.86 to 0.91, respectively (*See, e.g.*, Specification at page 6, lines 25-27). Claims 28 and 42 have been amended to recite preferred water activity embodiments (*Id.*). Claims 26 and 38 have been amended to recite a preferred embodiment wherein the cream or dairy component is present in an amount of about 5% to about 25% (*See, e.g.*, Specification at page 4, lines 11-13). Claim 38 has also been amended to clarify that the cream composition is maintained under refrigeration for the recited time period, however, no modification in scope is intended by this amendment. No new matter has been added by way of these amendments, such that their entry at this time is warranted.

Claims 38-46 were rejected under 35 U.S.C. § 112, first paragraph, for lack of possession of the invention on page 2 of the Office Action. The Office Action alleges that three different passages in the specification concerning the need for refrigeration to retain texture and taste characteristics, *i.e.*, remain edible, are insufficient support for the language of claim 38 that the composition must be refrigerated to provide a shelf life of at least 45 days. In addition to the glaringly explicit support that the Office Action has already noted, Examples 1, 2, and 3 each additionally state either that the "composition . . . is then stored at refrigerator temperature" (emphasis added) and that the composition still contains live bacteria "after being chilled for 45 days." Thus, each example requires storing at refrigerator temperature or chilling over such a lengthy period of time. When considering all these disclosures together, this provides clear and unambiguous possession of the claimed feature that the composition must remain refrigerated to provide a shelf life of at least 45 days. Also, the amendment to clarify that the cream composition is maintained under refrigeration clarifies what is being claimed so that it also clarifies that support exists in the specification for the claimed language. For any of these reasons, the rejection under 35 U.S.C. § 112, first paragraph, has been overcome and should be withdrawn.

Claims 38-46 were rejected under 35 U.S.C. § 112, second paragraph, for indefiniteness on pages 2-3 of the Office Action. The Office Action alleges that the same

language of claim 38 is unclear since it is not clear if the product must be refrigerated in a preparation step or if the only way to achieve a shelf life of at least 45 days is by storing the product under refrigeration. Although Applicants believe this claim language to be clear for all the reasons previously noted, and based on all the disclosure of this feature in the specification, Applicants have amended claim 38 to more clearly recite that to achieve a shelf life of at least 45 days the cream must be stored under refrigeration. For these reasons, the rejection under 35 U.S.C. § 112, second paragraph, is believed to be overcome and should be reconsidered and withdrawn.

Claims 26, 29-30, 32-35, and 46 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 4,762,725 to Player et al. ("Player") on pages 3-5 of the Office Action. Player is alleged to teach 10-20% milk derivatives (Examples 1-2), 8-30% sugars (Examples 1-2), 10-60% fermented dairy product (27% cheese powders in Example 1), 0.01% to 25% sour cream with 36% fat (5% sour cream in Example 2), 0.01 to 35% texturing agent such as maltodextrin (7% in Example 2), and 0.01 to 20% flavor (jalapeno powder in Example 2), with the "cream" being disposed on a biscuit (Col. 13, lines 29-38). Player is also alleged to teach salt along with the cheese powders, but is silent on a specific amount. This is alleged to be an obvious result-effective variable based on flavor.

It is clear that Player is explicitly *non-aqueous* (Col. 1, lines 23-25 and Col. 3, line 22), while the present invention is clearly aqueous. In particular, independent claims 26 and 38 recite sour or dairy creams, which are well known to contain some water content distinct from that taught by Player. Claims 26 and 38 now also recite a water activity of 0.75 to 0.91 and 0.86 to 0.91, respectively. Also, claims 26 and 38 have been amended to recite at least about 5% sour cream or dairy cream. Thus, the independent claims now more clearly and distinctly recite the presence of water, since water activity cannot exist in the absence of water. Also, the Office Action improperly alleges that the specification does not "exclude" powdered sour cream. This is not a proper interpretation of the clear, unambiguous claim language presently recited. The claims recite "sour cream or dairy cream," and this unambiguous language cannot be twisted to mean something else. Nothing in the specification states that these creams could be only in powdered form, and that is sufficient to demonstrate that the position taken in the Office Action is improper. In fact, the specification confirms that the cream is not a powder, since a powder could not be aerated as optionally may be done with the creams of the invention (Specification at Page 6, lines 32-38). Thus, Player *teaches away* from the claimed invention and no *prima facie* case of obviousness exists in view of Player.

Player is also deficient in that it simply does not disclose sour cream having 25 to 45% fatty substances as alleged in the Office Action. The Office Action claims that "Sour Cream 36 (Mid America)" is sour cream. On the contrary, a glance at the chart of Example 2 clearly indicates that the composition includes three (3) types of cheese powders including powders of parmesan, sour cream, and blue cheese. If the amounts of the three types in the right-hand column are added they result in the sum total of 32.3% cheese powder. Thus, it is clear that, although Player indeed discloses cheese powders, it simply does **not** teach sour cream--but only in powdered form as a cheese powder. Player contains absolutely no further disclosure--and not even a remote suggestion--of sour cream, as presently recited. Moreover, Player does not teach the recited amount of molten fat since its sour cream is simply a powder and cannot have any molten fat portion as a powder. Thus, Player also does not teach this recited feature of claims 26 and 38. The Office Action alleges that trace moisture in the blue cheese of Player combined with the sour cream powder could create the "equivalent" of 0.17% sour cream. This is an improper interpretation of Player, since the trace water would not mix sufficiently with the powder to create a true sour cream or dairy cream.

Further, Player does not teach the amount of salt required for a suitable cream composition as presently recited. Indeed, since Player teaches away from the present invention by disclosing a non-aqueous spread, and one that does not have sour cream as presently recited, it would not have provided the proper motivation for one of ordinary skill in the art to simply optimize the amount of salt presently recited. While one of ordinary skill might have achieved success at simply optimizing the amount of salt, no motivation existed to do so. This is particularly apparent when considering that Player teaches a completely different vegetable oil/lipid based spread that is not even refrigerated, as compared to the invention recited in claim 38.

Due to all these differences, it is clear that the organoleptic properties of Player's composition is completely different from the composition that is claimed by applicants. Rather than being a room temperature stable amorphous paste, Applicants' composition is a fresher-tasting dairy-type composition that is perceived to be more natural than processed. This type of composition finds greater consumer acceptance than the amorphous pastes of the reference, such that a surprising and unexpected benefit is achieved by the claimed invention compared to the prior art.

Moreover, Example 2 does not teach milk derivatives as presently recited. These milk derivatives are well defined in the specification to include only powdered unskimmed milk, powdered skimmed milk, sweetened evaporated milk, or a combination

thereof. Example 2 of Player contains at best 5% milk derivative, well below the 10 to 20% also presently recited in claims 26 and 38. While Example 1 does indeed contain 10% skim milk solids, it fails to teach various other claimed features of the present invention.

Independent claim 38 also recites the transition language "consisting essentially of," however, the Patent Office is presently treating this term as meaning "comprising." As discussed at the interview, this claim is still patentable even here where the term is interpreted as comprising. Claim 46 also recites specific biscuit products, none of which are taught by Player. Player at best teaches sandwich and cracker creams and extrudable confectionary centers, while claim 46 now recites the cream composition is disposed between two layers of biscuit each of which comprises cake, gingerbread, brioche roll, or Viennese bread or buns. For these reasons, Player does not teach the claimed invention. Thus, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since no *prima facie* case of obviousness has been stated.

Claims 27 and 44 were rejected under 35 U.S.C. § 103(a) as being obvious over Player in view of EP No. 0,666,031 to Lauro et al. ("Player") on pages 5-7 of the Office Action. Lauro is alleged to remedy the deficiencies of Player with regard to the living bacteria of these claims, *e.g.*, live active cultures starting at 10^7 to 10^{11} per gram of filling, such as yogurt powder with active cultures.

Initially, claims 27 and 44 are dependent and therefore patentable even over this combination since Player does not teach all the features of independent claims 26 and 38 as discussed above. Additionally, Lauro does not remedy certain deficiencies of Player. In particular, the composition of Lauro, like Player, is also stored at room temperature, and as such Lauro also fails to teach a composition that needs to be chilled to maintain the living culture for 45 days, as recited in claim 44. Also, Lauro specifically teaches that a concentration after testing provided a concentration "as high as" 8×10^5 lactobacilli per gram of cream. On the contrary, claim 44 specifically recites that the bacteria concentration is over 10^6 /gram of the food composition after being chilled 45 days.

While the Office Action takes pains to discuss the longer test of Lauro it overlooks the fact that Lauro's bacteria need only survive under *room temperature conditions*, while claim 44 specifically recites the surviving bacteria concentration of a more adverse chilled condition. Even Lauro does not achieve the high concentration of living bacteria after long-term chilling presently recited by claims 27 and 44, and of course, Player fails to teach this as well. More importantly, no motivation to combine Lauro with Player existed. Even if Lauro could have achieved success in obtaining the level of bacteria recited in claim 44, the

Office Action has failed to address this lack of motivation in the cited references. Lauro teaches a dairy product, *i.e.*, cream which inherently contains some water content, while Player, as previously discussed, teaches exactly the opposite: a *non-aqueous* processed composition that at best has trace moisture in one component but without any teaching that this moisture is uniformly distributed or would be sufficient to form a cream out of a powder. Regardless of what the present claims recite or do not recite, the references *teach away* from each other and away from any motivation to combine them for a rejection. Thus, this combination is improper and clearly based on hindsight rejection since the present claims are being used as a template to pick and choose claimed features from disparate prior art references. For these reasons, claims 27 and 44 are separately patentable, even over the Player and Lauro rejection.

Claims 26, 30-34, 36, and 39-41 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 5,800,855 to Rosen ("Rosen") in view of U.S. Patent No. 5,145,697 to Cajigas ("Cajigas") on pages 7-8 of the Office Action. The Office Action points out that Rosen teaches aerated, frozen cheesecake ice cream used to make ice cream sandwiches at Col. 5, lines 1-6.

Initially, Applicants appreciate the recognition that independent claim 38 is patentable over this combination. Rosen discloses a cream composition that includes about 13% cream cheese, about 24.5% cream, about 19.4% milk, about 10.3% condensed skim milk, about 32.2% liquid can sugar (21.5% dry can sugar along with 10.7% water may be substituted), 0.5% of a stabilizing system (which may contain salt), and 0.1% vanilla extract (*See, e.g.*, Example 1, column 5, lines 40-52). The stabilizing system may further include carob bean gum, guar gum, or carrageenan. Rosen, however, fails to teach the water activity range of 0.75 to 0.91 now recited in claim 26. Moreover, Rosen fails to teach a milk derivative as presently recited. Rosen fails to teach any of these milk derivatives, or to remedy the other deficiencies of Player as to these claimed features.

Moreover, dependent claim 30 recites a preferred embodiment where the specific milk derivatives are recited and in an amount of 15 weight percent to about 20 weight percent, which Rosen also fails to teach even if condensed milk were erroneously considered to be a milk derivative as presently recited. Rosen teaches only 10.3% condensed milk, and a different milk derivative and a different amount compared to the 15 to 20 weight percent recited in claim 30.

Furthermore, Rosen fails to teach the amount of both the texturizing agent and the salt. While a single variable might be obvious to optimize, the need to optimize multiple

variables--and for a different purpose--is more than mere "routine experimentation" for one of ordinary skill in the art. Indeed, Rosen teaches frozen cheesecake ice cream, while the present invention recites a cream composition on a biscuit layer or between biscuit layers. Ice cream is a frozen material with different preparation requirements, different storage requirements, different transportation requirements, and the like compared to a sour cream or dairy cream as presently recited. The motivation to achieve particular levels of texturizing agents and salt in the frozen confectionery products of Rosen is significantly different than that for the claimed invention. Cajigas fails to remedy this deficiency since it is merely used to demonstrate various types of texturizing agents. For these reasons, the combination of Rosen and Cajigas does not disclose or suggest each and every feature of the present claims. For at least this reason, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since a *prima facie* case of obviousness has not been shown with respect to claims 26, 30-34, 36, and 39-41.

Dependent claim 45 was rejected under 35 U.S.C. § 103(a) as being obvious over Rosen in view of Cajigas and U.S. Patent No. 4,145,449 to Nelham ("Nelham") on page 9 of the Office Action. Nelham is relied on for the teaching of packaging ice cream sandwiches in hermetically sealed plastic coated sachets to maintain ice cream separate from the sandwich or biscuit to avoid sogginess. While a motivation to combine these references may very well exist for the sake of argument, even the combination still fails to teach the features of the independent claims. Claim 45 recites all the features of claim 26 in addition to the sachet, and even if Nelham is combined with Rosen and Cajigas there is still no reasonable expectation of success in achieving the claimed invention due to Rosen's various deficiencies previously noted.

Claims 26-32, 35, 38, 42, and 46 were rejected under 35 U.S.C. § 103(a) as being obvious over U.S. Patent No. 4,721,622 to Kingham et al. ("Kingham") in view of an article titled "Yoghurt [sic] Science and Technology" by A.Y. Tamime et al. (1985) ("Tamime") and Player for the reasons recited on pages 9-11 of the Office Action. Tamime is relied on solely for the teaching of a yogurt as a fermented dairy product as recited in claim 27 (Office Action at the bottom of page 9), and since claim 27 is not specifically discussed below no further discussion of Tamime is warranted.

Kingham discloses a food product with a bread-like casing having a filling, with an optional barrier layer (*See, e.g.,* Abstract). Kingham teaches a large variety of filling materials, including a filling of cream cheese, double cream, milk, ground onions, salt, spices, maize starch, gelatin, and water (Example 1); and yogurt, dried cream, dried onion, modified

starch, salt, pepper, dextrose monohydrate, disodium dihydrogen pyrophosphate, fat, emulsifier, gelatin, water, cooked bacon, and grated cheddar cheese (Example 2).

Before discussing the specifics of the rejection, it is important to understand that Kingham is not directed to cream compositions at all. Rather, it is directed to improved casings, and methods for making the same, that are used to surround fillings. The Office Action has simply picked and chosen components from different examples of fillings to arrive at the present rejection. Kingham, however, teaches fillings in general with specific examples rather than teaching cream compositions in general.

Kingham fails to disclose or suggest a milk derivative (as recognized in the final Office Action mailed December 20, 2001), amount of salt, and the presence of sugar as recited by the present claims. The current Office Action, however, has renewed its use of Kingham as teaching milk as a "milk derivative equivalent." The current Office Action is improperly relying on only one portion of the present specification and has overlooked the disclosure/definition of a limited set of specific milk derivatives, which are powdered and different from Kingham's milk. Also, Kingham's milk contains approximately 88% water content, as noted in the Office Action, thus it is a different component than the milk derivatives presently claimed. One of ordinary skill in the art would not necessarily have been motivated to substitute one amount of milk for a *different amount of powdered milk*.

Based on discussion at the interview, Kingham's 20.8% milk contains slightly over 2% milk solids ($12\% * 20.8\%$). Thus, even if a motivation existed to use the claimed milk derivatives instead of the high-water content milk of Kingham, this amount of alleged milk solids is well under the 10% to 20% of milk derivative presently recited. Kingham simply does not teach the claimed level of milk derivatives recited in claims 26 and 38.

Player has *exactly the same deficiency* as Kingham insofar as it also fails to teach a milk derivative as presently recited. While Player does teach the inclusion of a milk derivative in Examples 1 and 2, it does not teach a sufficient amount in Example 2 and Example 1 fails to disclose or even suggest a variety of other features presently claimed. More importantly, and as previously discussed, Player as a whole *teaches directly away* from Kingham since it is non-aqueous while Kingham teaches milk with an 88% water content (*i.e.*, approximately 18% water content just from the milk alone). Also, Kingham's use of milk instead of one of the recited derivatives would have an adverse effect on the shelf life of the composition recited in claim 38. Indeed, Kingham is specifically directed to ambient-temperature storable products (Col. 1, lines 42-59).

Furthermore, Kingham additionally fails to teach sugar or an appropriate amount thereof, as presently recited, since it is directed to non-confectionery fillings. The Office Action states that "Kingham et al. teach the creams may be either sweet or savory." On the contrary, Kingham is not directed to cream compositions and makes no such teachings. Kingham is referring only to the fillings in general, and provides no motivation as to making specific fillings like the present cream composition sweet or savory. The continued use of Kingham as a primary reference can be nothing other than an improper hindsight rejection based on these serious deficiencies of Kingham's teachings.

In sum, Kingham fails to teach salt content, as discussed in responses to previous Office Actions. Player also contains this fatal deficiency with respect to a suitable salt content, since both references even if improperly combined still do not teach the claimed salt content as presently recited. Moreover, Kingham has at least an approximately 18% water content from the milk according to the Office Action, which renders it aqueous. Thus, Kingham also teaches away from the non-aqueous material of Player. Thus, no motivation existed for one of ordinary skill in the art to combine these references, and the Tamime reference is silent on this issue since it is mentioned only in connection with claim 27.

Moreover, one of ordinary skill in the art would not have reasonably expected to achieve success in combining such disparate products to provide a cream composition disposed on at least one layer of a biscuit, as presently recited. It would not have been reasonable to take Kingham's non-confectionery food product, remove various filling components, substitute various other types and amounts of components for those as to which both references are silent, and expect to successfully obtain the presently claimed invention.

Even if Kingham and Player were improperly combined, even the combination of these cited references fail to teach the presently recited milk derivatives in the claimed amount, salt content, and the sugar content, as presently recited. Moreover, the Office Action acknowledges that even the combination of Kingham, Player and Tamime does not teach the aromatic products or texturizing agent of claims 33-34, as well as several other dependent claims. Therefore, these claims should be allowable if rewritten in independent form in view of the claim amendments made herein. For these reasons, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn since no *prima facie* case of obviousness has been demonstrated on the record.

Dependent claim 43 was rejected under 35 U.S.C. § 103(a) as being obvious over Kingham in view of Tamime and Player, and further in view of U.S. Patent No. 5,573,793 to Saintain ("Saintain") for the reasons recited on pages 11-12 of the Office Action.

Claim 43 depends from otherwise patentable claim 38, and as such is patentable over the cited prior art. Moreover, claim 43 is separately patentable as follows.

Tamime fails to teach anything relating to aeration, as recited in claim 43, and as such is irrelevant to this rejection. Player is also not specifically relied upon other than with respect to the parent claim(s). As previously discussed, Player and Kingham are not combinable since no motivation existed for one of ordinary skill in the art to do so, and no reasonable expectation existed for one of ordinary skill in the art to successfully achieve the claimed invention.

The Patent Office previously rejected independent parent claim 38 over Kingham in view of Saintain (Office Action mailed December 20, 2001). Applicants filed an Amendment on May 20, 2002 to explain that--in pertinent part--there is no motivation to combine Kingham and Saintain and no reasonable expectation of successfully achieving the claimed invention even if a motivation did exist. This rejection was completely withdrawn in the following Office Action mailed August 8, 2002, and it is still an improper rejection even as to claim 43, even when considering Tamime in combination with Kingham and Saintain.

More specifically, Saintain fails to remedy the deficiencies of Kingham, which is discussed above. Saintain discloses a confectionery food composition containing a cookie or chocolate shell having a dairy based filling that is fermented with live lactic acid bacteria and can be aerated. The filling may contain yogurt, sugars, milk proteins, and several other ingredients. The Office Action cannot properly state that the combination of Kingham and Saintain teaches the features of the invention by using the salt of Kingham's filling and the sugar of Saintain's filling, since these cited references effectively teach that their fillings are mutually exclusive. For these reasons, no motivation existed for one of ordinary skill in the art to combine the Saintain sweetened confectionery-type filling with only part of Kingham's non-confectionery filling. Indeed, Saintain is an aerated confectionery and Kingham is a non-aerated, non-confectionery.

There was also no motivation in the cited art for one of ordinary skill in the art to combine the non-confectionery snack food product of Kingham with the cookie or chocolate shell composition of Saintain, as is required to establish a *prima facie* case of obviousness. Even though the references were combined before to reject a composition claim, there is still no motivation to combine them here and apply them against the aeration claim. The nature of the claim recitation is irrelevant to a motivation to combine, which is determined only through the cited references themselves. Thus, this combination of Kingham and Saintain is still improper and inapplicable as to claim 43. Only through a hindsight

reconstruction of picking and choosing features from the disclosure of the present invention would one ever attempt to combine these disparate references. One of ordinary skill in the art would not have been motivated to combine Kingham's non-confectionery bacon and cheddar cheese, or the filling of Example 1, with the confectionery cookies having dairy filling taught by Saintain, for example, unless resort were improperly made to the Applicants' own teachings in the application to pick and choose ingredients required to obtain the Applicants' invention.¹

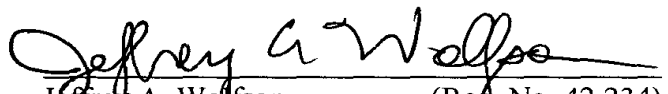
Moreover, one of ordinary skill in the art would not have reasonably expected to achieve success in combining such disparate products to provide aeration to a cream composition disposed on at least one layer of a biscuit, as presently recited. It would not have been reasonable to expect one of ordinary skill in the art to take Kingham's non-confectionery food product, remove various filling components, substitute various other components for those as to which both references are silent, choose to aerate even when Kingham does not, and expect to successfully obtain the presently claimed invention. For these reasons, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn since no *prima facie* case of obviousness has been demonstrated on the record.

Accordingly, applicants now believe all claims are in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues and expedite allowance of this application.

Respectfully submitted,

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¹ In the obviousness context, a motivation must have existed for one of ordinary skill in the art to combine the references--and the lack of such a motivation demonstrates the patentability of the claims over the cited references, or at the very least demonstrates the lack of a *prima facie* case of obviousness by the Patent Office. *In re Lee*, 277 F.3d 1338, 61 U.S.P.Q.2d 1430 (Fed. Cir., 2002) (finding that the Board of Patent Appeals and Interferences improperly relied upon common knowledge and common sense of person of ordinary skill in art to find invention of patent application obvious over combination of two prior art references, since factual question of motivation to select and combine references could not be resolved on subjective belief and unknown authority).